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No. 88-1781

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE ALGOMA STEEL CORPORATION, LIMITED,
Petitioner,

v.

THE UNITED STATES and U.S. INTERNATIONAL TRADE COMMISSION,
Respondents,

and

LONE STAR STEEL COMPANY,
Respondent,

IPSCO, INC. and IPSCO STEEL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICUS CURIAE THE PROVINCE OF ONTARIO IN SUPPORT OF THE PETITION

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STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The Province of Ontario, taken alone, is the United States' second largest single trading partner, after Japan. In 1988, Ontario exports to the United States exceeded 47 billion dollars (U.S.), and two-way trade exceeded 98

[1] This brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk.

billion dollars (U.S.).[2] Eighty-six percent of Ontario exports are destined for the United States.[3] This trade spans a wide range of industries and products, encompassing both raw materials and manufactured goods, from automobiles and steel to pulp products. The Province thus has a substantial interest in the manner in which the United States enforces its trade laws.

The Province has significant concerns about the long-term adverse consequences for United States-Ontario trade caused by the decision of the Court of Appeals for the Federal Circuit in this case. The Federal Circuit ruled that in making a final determination of material injury under the United States antidumping law, the United States International Trade Commission ("ITC") is not obligated to differentiate between the impact of fairly traded and unfairly traded imports. If the ITC is permitted to disregard the actual percentage of imports determined to have been sold at less than fair value and effectively presume that 100 percent of the subject imports were dumped, the result will be that numerous antidumping orders will be issued without any showing that dumping—the unfair trade practice that the law is intended to remedy—was a cause of material injury to a domestic industry. The Province of Ontario believes that such a result is contrary to both United States law and the Antidumping Code of the General Agreement on Tariffs and Trade ("GATT"), an international agreement to which Canada and the United States are signatories. Moreover, because of the potential for significant disruption to United States-Ontario trade that such unwarranted antidumping duty orders pose, the Province believes that it is critical that this Court review the Federal Circuit's decision.

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[2] Statistics Canada, Exports by Commodity, Catalog 65-004 (Dec. 1988). Canadian dollar figures converted to U.S. dollars at the Bank of Canada average 1988 exchange rate.

[3] *Id.*

ARGUMENT

I. The Federal Circuit's Erroneous Interpretation of the Antidumping Law Poses the Potential for Significant and Unwarranted Disruption of United States-Ontario Trade.

The issuance of any antidumping duty order, even a lawful one, creates considerable disruption to trade. The final assessment of duties is suspended indefinitely on all imports of merchandise of the class covered by the order. Final assessment of antidumping duties typically must wait until the United States Department of Commerce completes its administrative review of the order, a process that often takes several years. In the interim, importers must deposit in cash estimated antidumping duties, which often bear little or no relation to the amount of duties ultimately assessed.

The requirement of an injury determination functions as a check on the indiscriminate use of the antidumping law. Domestic interests seeking an antidumping duty order must demonstrate not only the existence of dumping, but also that a domestic industry was materially injured by the dumping, or threatened with such material injury. As demonstrated by the legislative history of the Trade Agreements Act [4] and the text of the GATT Antidumping Code [5]—on which the antidumping provisions of the Act were based—the injury determination contemplated by the law must be more than a finding that competition from imports has played a role in the poor performance of an industry. Rather, there must be a causal link between *dumping* and the injury to the domestic industry.

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[4] Pub. L. No. 96-39, 93 Stat. 144 (1979), relevant portions codified as amended at 19 U.S.C. §§ 1673 *et seq.* (1982 & Supp. V 1987).

[5] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650.

The ITC practice upheld by the Federal Circuit in this case, whereby the ITC deliberately ignores findings by the United States Department of Commerce that a substantial percentage of the subject imports were fairly traded and instead presumes that 100 percent of the imports were dumped, effectively eliminates the necessity of proving a causal link between dumping and injury. As a result, the requirement of an injury finding no longer serves its intended purpose of confining the issuance of antidumping duty orders to those instances where unfair price discrimination has caused material injury to a domestic industry.

Letting this improper interpretation of the law stand would have a particularly adverse effect on United States-Ontario trade. The Ontario economy is integrally linked to the United States midwestern economy. Hundreds of firms have operations on both sides of the border, and there are close relationships between suppliers and manufacturers in the other country that are unusual in international trade. Products frequently cross the border several times at successive levels of manufacture before a finished good is produced, with firms on both sides of the border coordinating production schedules and cooperating to an unusual degree.

The application of United States trade laws to this commerce is not simply a matter of assessing duties on finished goods that arrive at a port. The potential disruption that can be caused by misapplication of the antidumping law is proportionately greater as a result of the complex and sensitive relationships involved, making it even more important that use of the antidumping law be limited—as intended by Congress—to those instances where unfair trade, and not simply a large volume of fair trade, has caused or threatened material injury.

The Federal Circuit has exclusive jurisdiction over appeals under the antidumping law, and its decision will

be the "law of the land" unless reviewed by this Court. If the decision is permitted to stand, United States industries that are performing poorly can certainly be expected to invoke the antidumping law to obtain protection from fairly traded imports. The issuance of such unwarranted antidumping duty orders will likely have a substantial negative impact on United States-Ontario trade, as it already has had with regard to the merchandise exported to the United States from Ontario by petitioner Algoma Steel Corporation. Legitimate trade between the United States and Ontario will be needlessly disrupted, to the detriment of both.

II. The Discrepancy Between the Federal Circuit's Decision and United States International Obligations Mandates Review by This Court of the Issue Presented *Before* That Issue Enters the Diplomatic Stage.

In 1979 Congress enacted the Trade Agreements Act, amending the United States antidumping law to conform to the GATT Antidumping Code, to which the United States became a signatory that year. The GATT Antidumping Code sets forth certain requirements that signatory nations must meet before they may impose antidumping duties on imported merchandise. One of the most important of these is a demonstration that dumped imports are causing material injury to a domestic industry. The Code makes clear that in making this finding, care must be taken to distinguish between the effects of dumped imports and the effects of other factors that could also be injuring the industry.

In particular, Article 3 of the Code requires that the effect of fairly traded imports not be attributed to the dumped imports:

> It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury . . . . There may be other factors* which at the same time are injuring the industry, and the in-

> juries caused by other factors must not be attributed to the dumped imports. [Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT Antidumping Code), Apr. 12, 1979, art 3, para. 4, 31 U.S.T. 4919, 4927, T.I.A.S. No. 9650.]

The footnote in the foregoing quotation explains that "[s]uch factors include, *inter alia*, the volume and prices of imports not sold at dumping prices . . . ." *Id.* at n.5.

There is no indication that Congress intended United States law to deviate from the GATT Antidumping Code on this point. To the contrary, the relevant committee reports on the Trade Agreements Act of 1979 demonstrate, in terms almost identical to the Code, that an affirmative finding of injury must be based on the impact of dumped imports only:

> [M]aterial injury must be 'by reason of' . . . less than fair value imports . . . . The law does not, however, contemplate that injury from such imports be weighted against other factors (e.g., the volume and prices of . . . imports sold at fair value, contraction in demand or changes in patterns of consumption . . .). [H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979). *See also* S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979).]

In reaching the contrary conclusion, the Federal Circuit simply ignored a statutory provision that fully supports the interpretation urged by Petitioner. That provision flatly specifies that "[t]he Commission shall make a final determination of whether an industry in the United States is materially injured . . . by reason of imports . . . of the merchandise with respect to which [the United States Department of Commerce] has made an affirmative determination [of dumping] . . . ." 19 U.S.C. § 1673d(b)(1) (1982 & Supp. V 1987).

If the Federal Circuit's decision is permitted to stand, the United States will be, based on a practice confirmed

by the final decision of its courts, in violation of its international obligations. This is not what Congress intended, and creates the risk that the United States, due to the error of the court below, will be called upon to answer in the diplomatic arena for a practice that was never intended by the Congress to exist. Review by this Court would provide an opportunity to eliminate the violation of the United States' international obligations.

CONCLUSION

For the foregoing reasons, and those in the Petition, the Province of Ontario respectfully requests that the Petition for a Writ of Certiorari be granted, and that the decision below be reversed.

Respectfully submitted,

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